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The Hybrid Dispute: Union Concerted Action in a Politically Motivated Boycott

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THE HYBRID DISPUTE: UNION CONCERTED ACTION IN A POLITICALLY MOTIVATED BOYCOTT

This Note focuses on union involvement in politically motivated protests and asks whether the use of union weapons, such as strikers and boycotts, in disputes removed from the traditional union context is governed by federal labor or antitrust laws. Federal labor laws traditionally were designed to regulate disputes concerning the relative bargaining power of unions and management in setting terms and conditions of employment. Federal antitrust laws do not cover concerted union action when such conduct falls within the purview of the labor laws. While constitutionally protected conduct, such as political protest and government petitioning, also is immune from antitrust regulation, the relationship between this political activism and union self-help is unclear. This Note proposes a more active judicial rule, based on antitrust principles, to effectively regulate that union political action which utilizes traditional labor weapons.

INTRODUCTION

MODERN, POLITICALLY conscious unions increasingly mobilize their work forces in the pursuit of purely political or ethical extra-union objectives. This type of action involves the coincidence of labor weapons—concerted work stoppage and/or boycotts with their incidental trade restraints on the flow of goods—and an underlying motive unrelated to the terms and conditions of employment. This conduct is thus a hybrid case because the boycott activity is of mixed composition and its elements—participants, motive, and impact—involve different areas of the law. This Note analyzes this hybrid union conduct under the labor and antitrust laws and specifies under what statutory scheme, if any, this conduct falls.

Part I of the Note explores the background of political boycotts in general, the increased politicization of American unions, and the incidence of nonwork directed union action in the United States.[1] Part II inquires into whether political protest by a labor union is covered by the secondary boycott prohibitions[2] of the National Labor Relations Act (NLRA) or whether such conduct would be subject to collective bargaining provisions and orders to arbitrate.[3] Part III examines the hybrid activity as a possible anti-

1. *See infra* notes 5-31 and accompanying text.
2. 29 U.S.C. § 158(b)(4) (1976).
3. *See infra* notes 32-94 and accompanying text.

trust violation.[4] The Note concludes that the courts should approach the union litigant in a hybrid dispute as they would approach any other political organization involved in a boycott. Thus, the judicial restraint traditionally adopted by the federal courts in cases involving labor unions would be minimized.

I. BACKGROUND

Political groups increasingly use boycotts to achieve social and political goals. Unions generally have used strikes and work stoppages—boycotts—to improve the terms and conditions of employment. More recently, however, unions have begun to use the boycott to achieve other than union-qua-union social and political goals. Employers, seeking to stop this hybrid union action, have questioned the legality of such conduct under the labor and antitrust laws.

A. *The Use of Boycotts*

The emergence of political groups in the late 1950's and 1960's, such as the women's movement, civil rights activists, and consumer protection groups, has prompted increasing attempts to effectuate social and political change through boycotts.[5] The

4. *See infra* notes 95-152 and accompanying text.

5. Consumers have boycotted meat, supermarkets, grapes, canned iced tea, sugar, soft drinks, slacks, lettuce, textiles, chocolate, Saran Wrap, tuna, and animal skins and furs. Political action has included NOW's convention boycott to press for ratification of the Equal Rights Amendment, National Federation for Decency's call for boycott of ABC-TV's "sleazy sex" programming, anti-abortionist boycott of March of Dimes because of its funding for prenatal diagnostic programs, California Ku Klux Klan plan to "help whites" by boycotting business unfriendly to the Klan, and the homosexual organizations' boycott of Florida citrus products in retaliation for the anti-gay campaign of Anita Bryant. *See* Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1131 n.4 (1980).

Boycott is defined by WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 264 (1961) as follows:

> [T]o 1: combine against (a person, employer, a group of persons, or a nation) in a policy of non-intercourse for economic or political reasons: withhold wholly or partly social or business intercourse from as an expression of disapproval or means or coercion or 2: to engage in concerted refusal to have anything to do with the products or services of (an employer) in order to force acceptance of certain conditions desired by a union.

The origin of the word boycott can be traced to Captain Charles Boycott, an agent who collected rents for a 19th century absentee English landlord. English landlords controlled much property in Ireland and demanded exorbitant rents from the tenant farmers. Boycott refused the farmers' payments, declaring them insufficient, and evicted several tenants. The community retaliated with a policy of total economic and social isolation against the rent collector. Despite his attempts to recruit imported labor, Boycott could not withstand this isolation and was forced to return to England. D. LOSMAN, INTERNATIONAL ECONOMIC SANCTIONS 2 (1979).

purpose and effect of boycotts on a nationwide or regional basis is to isolate economically and stigmatize socially a particular sector of society. Such effects are achieved by directing the boycott toward a particular group or corporation which the activist finds offensive for moral, religious, or political reasons. Boycotts often result in immediate and serious financial harm to the target[6] which, in turn, prompts increasing judicial intervention in response to private tort and antitrust claims.[7]

While consumer and political boycotts have significantly affected United States domestic trade and commerce, the extension of boycotts to the international trade zone has created further restrictions on the free flow of goods and services among nations.[8] In the United States, both the federal government and private groups have instigated concerted refusals to deal with nations whose internal and foreign policies are dangerous, threatening, or politically distasteful.[9]

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6. A 1963 civil rights boycott of retail merchants in Birmingham, Alabama cost the merchants approximately $750,000 a week in lost business. An NAACP boycott of merchants in Port Gibson, Mississippi resulted in business losses of approximately $1 million. *See* Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 659 (1978); Note, *Secondary Consumer Boycotts*, 54 U. DET. J. URB. L. 579 (1977).

7. *See* Missouri v. National Org. for Women (NOW), 620 F.2d 1301 (8th Cir. 1980); Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131 (1980). *See generally* Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979); Bird, *Sherman Act Limitations on Noncommercial Refusals to Deal*, 1970 DUKE L.J. 247; Marcus, *Civil Rights and the Antitrust Laws*, 18 U. CHI. L. REV. 171 (1951); Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 RUTGERS L. REV. 773 (1974); Comment, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule*, 71 NW. U.L. REV. 818 (1977); Note, *Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act*, 30 U. CHI. L. REV. 171 (1962).

8. During World War II, the League of Nations imposed economic sanctions on Italy in 1935 with Mussolini's invasion of Ethiopia, and again in 1938 on Japan for bombing Chinese cities. D. LOSMAN, *supra* note 5, at 4. The Arab League instigated a boycott of Zionist produce in 1944, "as long as their production in Palestine might lead to the realization of Zionists political aims." *Id.* at 49 (citing Boutros-Ghali, *"The Arab League: Ten Years of Struggle,"* 1954 INTERNATIONAL CONCILLIATION, 383, at 421). In 1948, the USSR, with its satellites, expelled Yugoslavia from a socialist-bloc regional trade and planning association, the Council on Mutual Economic Aid. In 1960, the Organization of American States invoked sanctions on the Dominican Republic for alleged intervention in Venezula. D. LOSMAN, *supra*, at 4.

9. During the American colonial period, many colonists refused to purchase certain British goods as a political protest. Later, the Jefferson administration implemented an official embargo against Britain. D. LOSMAN, *supra*, note 5, at 2. Castro's rise to power in Cuba in the late 1950's and the decaying U.S.-Cuban political relationship culminated in an official embargo on exports to Cuba. *Id.* at 21. In the post-World War II era, under the Export Control Act, the United States abstained from trade with several other communist nations for years. *Id.* at 5. In July 1968, the United States formally joined with Britain and the United Nations in a total embargo on all exports to Rhodesia in response to the Rhode-

In view of the success of boycotts in isolating and injuring industries and manufacturers, it is not surprising to find American labor unions mobilizing their ranks in concerted action against employers allegedly maintaining unfair labor practices and economic policies unfavorable to the workers.[10] The classic strike or work stoppage is actually a boycott in which the workers concertedly withdraw their services from the employer to affect a particular goal. In employing traditional concerted action, the labor union almost exclusively acts in a dispute which is both regulated by the NLRA and concerned with the terms and conditions of workers' employment. The union exercises economic warfare against employers to pressure them into accepting their proposals, and in so doing, carries on self-help which is limited and regulated by federal law.[11]

In recognition of the potential for severe economic harm in a mass labor boycott, Congress, in section 8(b)(4)(B) of the Taft-Hartley amendments to the NLRA, limited the ability of a labor union to extend its boycotts and work stoppages beyond its primary employer.[12] In so doing, Congress expressed concern for innocent, neutral parties unconnected with the union's interest and objectives, yet harmed by the union's boycott.

B. *Union Politicization*

With an increased awareness of national and international

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sian white minority government's unilateral declaration of independence. *Id.* at 93. Interestingly, the originator of the term boycott (Captain Boycott) also was embroiled in an international political dispute. *See supra* note 5.

10. *See generally* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967) ("Hot cargo" agreements); NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58 (1964) (product picketing); Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667 (1961) ("reserved gates"); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951); Douds v. Metropolitan Fed'n of Architects, 75 F. Supp. 672 (S.D.N.Y. 1948) ("ally doctrine").

11. Labor Management Relations (Taft-Hartley) Act § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1976).

12. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947). To come within the language of § 8(b)(4)(B), it is sufficient that the union engaged in the prohibited activity disrupts the business relationships of a neutral employer with the express purpose of forcing that employer to demand a change in the labor policy of the person or corporation with whom it does business. *See* Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 KAN. L. REV. 651, 657 (1971). The limitation of the broad language of § 8(b)(4)(A) to "secondary" situations was in "conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951).

politics, labor unions are markedly willing to boycott for purely political purposes. In the last half century, American politics has witnessed the emergence of activist unions on the legislative level and in the work place.

As special interest groups in the United States have evolved into major political forces in the legislative process, the labor union has been, and continues to be, an active and visible source of political support. Labor endorsements of political candidates and union contributions, in cash and in kind, to political parties are critical in governmental elections.[13] Furthermore, union lobbyists who have earned a reputation for skill and effectiveness rarely confine their efforts to issues which concern union members qua union members.

In 1974, the high priority issues of AFL-CIO lobbyists were national security, the preservation of democratic government, the impeachment of Richard Nixon, reform of the housing program, full funding of poverty programs, consumer protection, increased funds for education and environmental protection, improvement of veterans programs, and the direct election of the President.[14] Vigorous lobbying by the AFL-CIO was critical in the adoption of Medicare, the food stamps program, the Economic Opportunity Act, and the Trade Expansion Act.[15] None of these issues, however, are classic labor concerns, such as proposed statutory restraints on strikes and concerted actions, Occupation Safety and Health Act (OSHA) regulations,[16] capital productivity, unemployment, and national trade.[17]

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13. In 1968, labor unions distributed 118 million leaflets, provided 638 telephone banks and 24,611 people to run them, and 72,225 canvassers. 117 CONG. REC. 6641 (1971) (remarks of Sen. Fannin). Most of these efforts were made by the AFL-CIO's Committee on Political Education (COPE). Labor spent $1 million in the 1974 midterm elections. 33 CONG. Q. WEEKLY REP. 1538 (1975). In 1976, Senator Goldwater released estimates that unions spent $3,222,155 on Senate elections and $2,449,170 on House elections. During these elections, COPE provided 120,000 volunteers, 20,000 telephones, and used a computer bank listing 11 million union members in 45 states to identify potential support for its candidates. 122 CONG. REC. 3347-49 (1976).

One commentator contends that the willingness of voters to formulate their election choices based on issues, instead of party affiliation, and the unions' generation of public awareness of the candidates whose stands on issues they favor, have given unions greater ability to influence election outcomes. G. WILSON, UNIONS IN AMERICAN NATIONAL POLITICS 35 (1979).

14. G. WILSON, *supra* note 13, at 67 (citing AFL-CIO, Labor Looks at Congress, 1973, at 111 (1974)).

15. G. WILSON, *supra* note 13, at 73.

16. 15 U.S.C. §§ 651-678 (1976).

17. Unions continue to be concerned about the amount of foreign goods being im-

C. *The Hybrid Dispute*

While labor lobbyists have been relatively inactive on issues of foreign policy,[18] the AFL-CIO and the International Longshoremen's Association (ILA) have voiced expressly hawkish policy views toward the USSR and other communist nations. Moreover, the AFL-CIO and the United Steel Workers, in addition to advocating government policies through lobbyists and candidate support,[19] have intervened directly in foreign affairs by providing financial and organizational support to noncommunist unions abroad in competing with their communist rivals.[20] This recent politicization of American unions in the foreign policy sphere has been evidenced by labor's use of traditional union weaponry for other than union-qua-union political purposes.

Factually, hybrid conduct involves a union work stoppage in sectors of an industry which employs parties and produces products which the union finds politically distasteful. The most recent example of such conduct, which produced the greatest trade restraints and judicial involvement, concerned the ILA's refusal to handle goods of both employers trading with communist nations[21] and countries hostile to ILA members.[22] This recent dispute be-

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ported into the United States and the competitive stance of American made products abroad as bearing on the level of productivity and employment in certain domestic industries. *See, e.g.*, Trade Act of 1974 §§ 1-613, 19 U.S.C. §§ 2101-2487 (1976). See particularly sections 203, 221-224, 231-238 of the Trade Act, 19 U.S.C. §§ 2253, 2019-2024 (1976), which provide for "adjustment assistance" for workers who have suffered increased unemployment due to decreased sales of production in firms harmed by increase of foreign imports of competitive products. See also accounts of U.A.W. & Ford Motor Company's petition before the U.S. International Trade Commission urging import restrictions for Japanese automobiles. N.Y. Times, Oct. 28, 1980, at D1, col. 6; *id.*, Nov. 11, 1980, at A1, col. 3; Wall St. J., Nov. 11, 1980, at 3, col. 1; *No to Curbs on Japanese Cars*, TIME, Nov. 24, 1980, at 86.

18. G. WILSON, *supra* note 13, at 81.

19. *Id.* at 128.

20. *Id.* at 129.

21. During the Cuban Missile Crisis of October 1962, the ILA refused to work vessels engaged in trade with Cuba in an attempt to eliminate any United States-Cuban commercial activity. NLRB v. ILA (Ocean Shipping), 332 F.2d 992 (4th Cir. 1964). In response to the taking of the United States embassy by Iranian revoluntionaries in Tehran in 1979, the ILA dock workers similarly refused to unload any Iranian goods at United States ports. Wall St. J., Nov. 14, 1979, at 3, col. 4. In January 1980, the ILA instigated a concerted refusal to work any ships handling Russian goods or destined for the USSR in protest of the Russian invasion of Afghanistan. *See* Jacksonville Bulk Terminals, Inc. v. ILA, 102 S.Ct. 2673 (1982), ILA v. Allied Int'l Inc., 102 S.Ct. 1656 (1982); Baldovin v. ILA, 626 F.2d 445 (5th Cir. 1980); Walsh v. ILA, 488 F. Supp. 524 (D. Mass.), *vacated sub nom.* Walsh v. AFL-CIO Local 799, 630 F.2d 864 (1st Cir. 1980). *See infra* notes 23-26 and accompanying text.

22. The ILA boycotted Bahamian ships to protest the Bahamian government's incar-

tween the ILA and importers and traders of Russian products is a paradigm case which illustrates the conduct, motivations, and problems of the hybrid boycott.[23]

On January 9, 1980, Thomas Gleason, president of the ILA, issued a directive instructing union members to cease handling Russian cargo as a political protest of the Russian invasion of Afghanistan. Consequently, ILA hiring halls refused to accept work assignments or refer workers to ships handling Russian goods or destined for the USSR. The directive stated that the workers were upset and that they refused to "continue the business as usual policy so long as the Russians insist[ed] on being international bully boys."[24] Importers and traders of Russian products as well as exporters of United States goods to the USSR discovered that the ILA would not handle their cargo at any American port. At no time, however, did the union establish picket lines or prevent other employees from working.

Allied International, which was engaged in the import, purchase, and sale of Russian wood products, filed charges with the National Labor Relations Board (the Board) alleging that the ILA had organized a secondary boycott in violation of sections 8(b)(4)(B)(i) and 8(b)(4)(B)(ii)(B) of the National Labor Relations Act (NLRA).[25] The District Court of Massachusetts denied the Board's request for an injunction pending the unfair labor practice charge. On appeal, the First Circuit held that a previous district court determination[26] that union political boycotts were not

ceration of union members for allegedly fishing inside Bahamian territorial waters. Harrington & Co. v. ILA, 356 F. Supp. 1079 (S.D. Fla. 1973).

23. *See* Jacksonville Bulk Terminals v. ILA, 102 S.Ct. 2673 (1982); ILA v. Allied Int'l, Inc., 102 S.Ct. 1656 (1982); Baldovin v. ILA, 626 F.2d 445 (5th Cir. 1980); Walsh v. ILA, 488 F. Supp. 524 (D. Mass.), *vacated sub nom.* Walsh v. AFL-CIO Local 799, 630 F.2d 864 (1st Cir. 1980).

24. *Walsh*, 488 F. Supp. at 526.

25. 29 U.S.C. § 158(b)(4)(i), (ii)(B) (1976). Allied alleged that the union violated the Act by preventing Allied's stevedoring company, Clark, from doing business with Waterman Steamship Lines, a cargo transport firm. Allied further argued that the union's secondary boycott forced Clark to cease doing business with Allied, Waterman to cease doing business with Allied, and that all three firms were prevented from doing business with the USSR. 488 F. Supp. at 525-26.

26. Baldovin v. ILA, No. 80-259 (S.D. Tex. filed Feb. 15, 1980). In a companion case, Mack v. ILA, 626 F.2d 445 (5th Cir. 1980), the union appealed from an order of the District Court for the Southern District of Georgia, which granted an injunction under § 10(*l*) of the NLRA enjoining the union from refusing to work in the ports of Savannah and Brunswick, Georgia based on grievances concerning the shipment of cargo to the Soviet Union. Under § 10(*l*), if the regional director has "reasonable cause to believe that such [secondary boycott] charge is true and that a complaint should issue, he *shall* . . . petition any United

subject to the NLRA's jurisdiction on the grounds that such conduct was not in commerce was res judicata as to all subsequent cases since the injunction involved work stoppages at every United States port and the national activities of the ILA.

In a separate action against the ILA,[27] Allied International sought a private damage remedy under section 303 of the Labor Management Relations Act,[28] alleging that the ILA's conduct was an illegal secondary boycott. Allied International also sought injunctive and monetary relief under the Sherman Act,[29] alleging that the ILA's concerted refusal to deal resulted in a restraint of trade. The District Court of Massachusetts held that the union's concerted refusal to deal, while not falling within the labor exemption to the antitrust laws, was nevertheless not a restraint of trade under the Sherman Act. The court based its holding on the rationale that the antitrust laws were intended to regulate business rather than political activity.[30] The court concluded, therefore, that the defendants had not engaged in a restraint of trade as defined by the Sherman Act.[31]

On appeal to the First Circuit, the court affirmed the lower court's holdings on the antitrust violation, as well as on the jurisdictional issue, holding the union's boycott to be "in commerce" under the NLRA.[32] However, the court of appeals found that the ILA boycott was within the section 8(b)(4) prohibition of secondary boycotts despite its political purpose, and was furthermore unprotected by the first amendment, and the Supreme Court affirmed.

II. THE LABOR LAWS

Under federal labor law, a hybrid dispute may be resolved by following two courses of action under separate, but interrelated, statutory schemes. An employer may file a secondary boycott charge with the Board which then may seek an injunction in federal court to prevent further boycotting. This avenue of redress requires that the controversy constitute a labor dispute and be "in

States district court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter." 29 U.S.C. § 160(*l*) (1976) (emphasis added).

27. Allied Int'l, Inc. v. ILA, 492 F. Supp. 334 (D. Mass. 1980), *rev'd in part*, 640 F.2d 1368 (1st Cir. 1981), *aff'd*, 102 S.Ct. 1656 (1982).

28. 29 U.S.C. § 187 (1976).

29. 15 U.S.C. §§ 1-4 (1976).

30. 492 F. Supp. at 338.

31. *Id.* at 339.

32. 640 F.2d 1368 (1st Cir. 1981).

commerce" under the secondary boycott provisions.[33] Furthermore, the Board must assume the burden of proving that the dispute is in fact secondary conduct—a classification undefined by the NLRA.

Alternatively, if a union is striking in violation of a collective bargaining agreement, an employer may seek a *Boys Markets* injunction in federal court against the work stoppage and an order to arbitrate.[34] The success of a *Boys Markets* injunction, however, is related intimately to both the scope of the federal court's power to compel arbitration and the extent to which the Norris-LaGuardia Act[35] prohibits federal court injunctions.

The outcome of litigation involving a hybrid dispute generally will depend on which claim an employer chooses to assert. Although the analysis under the NLRA parallels that under the Norris-LaGuardia Act with respect to the interpretation of a labor dispute, a finding that such a dispute is absent from the hybrid case may have a radically different impact under the two Acts. With respect to the commerce and arbitrability issues, a single strike will involve separate inquiries under the two labor provisions, and the different focus, purposes, and judicial interpretations of the separate laws will determine the outcome of the case.

A. *The National Labor Relations Act*

The employer initiates redress for a union's illegal conduct under the NLRA by filing an unfair labor practice charge with the Board.[36] The Board, in a case alleging secondary conduct, seeks a federal court injunction against the union boycott.[37] The Board then assigns the case to an administrative law judge who investigates the complaint and adjudicates the claim, making findings of fact and interpreting the relevant case and statutory law.[38] The NLRA provides for judicial review of the Board's final decision in

33. *See infra* notes 39-59 and accompanying text. *See also* 29 U.S.C. § 158(b)(4)(ii) (1976) (unfair labor practice to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce. . . ."); *id.* § 151 (purpose of the NLRA to protect union exercise of freedom of association "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection").

34. Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970). *See also* R. GORMAN, LABOR LAW 608-18 (1977) (analysis of the *Boys Markets* decision and its implications).

35. 29 U.S.C. §§ 101-115 (1976).

36. R. GORMAN, *supra* note 33, at 7.

37. National Labor Relations Act (NLRA) § 10(j), (*l*), 29 U.S.C. § 160(j), (*l*) (1976).

38. R. GORMAN, *supra* note 33, at 8.

the appropriate circuit court.[39]

In the hybrid dispute, an employer typically brings a secondary boycott charge alleging that the union, by its work stoppage, is attempting to force the employer to cease doing business with the particular parties who the union finds politically distasteful. If the union objects to and is boycotting the products handled by a third party who is dealing with the primary employer and does not object to the political activities of the primary employer itself, a prima facie case of secondary activity arguably would be established.

1. *Labor Disputes*

The NLRA was enacted to regulate the conduct of people engaged in labor disputes.[40] A prerequisite to Board jurisdiction, therefore, is that the work stoppage pursued by the union for noncommercial and political reasons constitutes a "labor dispute" as defined by the Act[41] and interpreted by the courts. The Act defines labor dispute in section 2(9):

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.[42]

The leading case which first interpreted labor dispute in a hybrid context, and which has been the basis for the most recent holdings in hybrid cases, is *NLRB v. ILA (Ocean Shipping)*.[43] *Ocean Shipping* involved the ILA's refusal to load or unload any ship which was being used for trade with Cuba. The union intended this action as a political boycott designed to cut off trade

39. *See generally* NLRA § 10(f), 29 U.S.C. § 160(f) (1976) (allowing "persons aggrieved by a final order of the Board" to seek review in a federal court of appeals); NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961) (scope of judicial review and a court's ability to review both questions of law and of mixed law and fact discussed).

40. NLRB v. ILA (Ocean Shipping), 332 F.2d 992, 995 (4th Cir. 1964) (citing Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365, 372 (1960)).

41. NLRA § 13(c)(1), 29 U.S.C. § 164(c)(1) (1976) states: "The Board . . . may . . . decline to assert jurisdiction over any labor dispute involving . . . employers, where . . . the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." *See id.* § 10(a), 29 U.S.C. 160(a) (1976), which refers to "labor disputes affecting commerce" which may be resolved by a state agency to whom the Board has agreed to cede jurisdiction.

42. NLRA § 2(9), 29 U.S.C. § 152(9) (1976).

43. 332 F.2d 992 (4th Cir. 1964).

completely with the Cubans. The Board brought suit to enforce a cease and desist order against the ILA for alleged violations of the secondary boycott provisions.

The Fourth Circuit Court of Appeals denied the injunction sought under section 10(*l*) of the NLRA, holding that the ILA policy calculated to eliminate trade with Cuba constituted political conduct and not a dispute grounded in terms and conditions of employment.[44] In rejecting the Board's notion that "whenever a union calls a work stoppage or refuses to supply labor there is a 'labor dispute,' "[45] the court explicitly distinguished situations where the union seeks to alter conditions of employment from cases where the union uses traditional concerted action to eliminate trade with a distant third party on purely political grounds.

The court's holding in *Ocean Shipping* is consistent with the literal terms of the statute. This jurisdictional limitation, however, insulates the union which engages in secondary conduct[46] supported by ulterior (not labor-related) motives. This effect is inconsistent perhaps with one of the purposes of section 8(b)(4)—the protection of neutral parties from economic insulation and harm. Such conduct, therefore, arguably should be enjoined because the employer, harmed by the political boycott, is as helpless to remedy the political dispute as it is to remedy a labor dispute when the union targets a primary employer with secondary pressure.[47]

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44. *Accord* Danielson v. Fur Dressers Local 2F, 411 F. Supp. 655 (S.D.N.Y. 1975). *Danielson* held (citing *Ocean Shipping*) that picketing by a leather workers' union of a fur importer who imported only processed skins, in protest of Argentina's law requiring that 80% of exported skins be processed, was not a labor dispute.

45. 332 F.2d at 996.

46. "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is party to the dispute, but upon some third party who has no concern in it." Local 501, International Bhd. of Elec. Workers v. NLRB, 181 F.2d 34, 37 (2d Cir.) (L. Hand, J.), *aff'd*, 341 U.S. 694 (1950). *See also* Goetz, *supra* note 12. Crucial to identifying a secondary boycott is pinpointing the secondary employer.

> He is one with whom the union has no dispute about his labor relations with his employees. These are the neutrals the statute was designed to protect because they do not have it within their own power to resolve the underlying dispute. . . . The union's only dispute with them—if it can be called a dispute—concerns their dealings with another employer against whom the union wants to exert indirect pressure in order to change the latter's . . . policies.

Id. at 657-58.

47. *See* S. REP. No. 105, 80th Cong., 1st Sess. 22 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 428 (1948); H. CON. REP. No. 510, 80th Cong., 1st Sess. 42 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 546 (1948). Senator Pepper, in contesting the passage of § 8(b)(4), asserted the "right of an American citizen to speak his mind to his neighbor, to ask him to help him in a common humane enterprise," and thought that the breadth of § 8(b)(4) outlawed any boycott, "no matter how legitimate the objective of

2. *In Commerce Under Section 8(b)(4)*

In addition to the requirement that the controversy before the Board be a labor dispute, the NLRA also requires that the hybrid dispute be "in commerce."[48] In light of the congressional purpose behind the secondary boycott provisions, judicial decisions have defined commerce more narrowly than the constitutional in commerce requirement.[49]

The secondary boycott provisions of the NLRA apply to any activities directed at individuals employed by a "person engaged in commerce or in an industry affecting commerce . . . ."[50] This provision supports the general jurisdictional limitations of the NLRA to activities "affecting commerce."[51] In addition to this overall jurisdictional limitation, section 8(b)(4) of the NLRA similarly limits the Board's jurisdiction to restrain and remedy secondary boycotts to parties "engaged in commerce" and industries "affecting commerce."[52] Although the cases have demonstrated[53] factually that boycotts which occur in the hybrid case have immediate chilling effects on interstate and international trade, within the context of section 8(b)(4), the hybrid dispute has been held not to be in commerce.

In *Baldovin v. ILA*,[54] a regional director of the Board brought suit under section 10(*l*) of the NLRA in response to charges filed by the Kansas and Texas Farm Bureaus of the American Farm Bureau Federation because local members of the ILA had refused to refer workers to load grain bound for the USSR aboard a Belgian ship.[55] The district court refused the injunction on the ground that the dispute was not in commerce and thus, the Board had no jurisdiction.[56] The *Baldovin* district court action was consolidated on appeal to the Fifth Circuit with *Mack v. ILA*,[57]

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the boycott was." Senator Pepper urged that a "distinction should have been made predicated on what the objective of the boycott is." 93 CONG. REC. 4,324 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1108-09 (1948).

48. NLRA § 8(b)(4)(i), 29 U.S.C. § 158 (b)(4)(i) (1976).
49. Baldovin v. ILA, 626 F.2d 445 (5th Cir. 1980).
50. NLRA § 8(b)(4)(i), 29 U.S.C. § 158(b)(4)(i) (1976).
51. *Id.* §§ 1, 2(b), 7, 29 U.S.C. §§ 151, 152(6), 157 (1976).
52. *Id.* § 10(a), 29 U.S.C. § 160(a) (1976).
53. *See infra* notes 120 & 128 and accompanying text.
54. 626 F.2d 445 (5th Cir. 1980).
55. *Id.* at 448.
56. *Id.*
57. 104 L.R.R.M. 2892 (S.D. Ga.), *vacated*, 626 F.2d 445 (5th Cir. 1980).

which involved the union's appeal from an order of the district court granting a section 10(*l*) injunction.

The Fifth Circuit concluded that for the purposes of the secondary boycott provisions, a hybrid dispute involving a union's grievance with a foreign nation did not affect commerce. The court emphasized that the purpose of the in commerce requirement in the secondary boycott was to narrow the labor dispute into a confrontation between primary opponents that could be remedied by a domestic authority.[58] In essence, an injunction to cease the secondary conduct would not resolve the ultimate union grievance, but would merely assuage the incidental effects on the importers—themselves innocent of any politically distasteful conduct. The prohibition of secondary boycotts, therefore, did not extend to work stoppages based on a union's desire to voice political protests and avoid "giving aid and comfort to a nation whose policies it consider[ed] inimical."[59]

To determine when conduct by a union which disrupts commerce does not affect commerce legally, it is necessary to recall that *Baldovin* formulates its test according to the purpose of the mandatory injunction provision in section 10(*l*) and the NLRA in general, and not according to the actual impact of the work stoppage. To be in commerce under section 8(b)(4), the union's objectives must be focused on affecting employer decisionmaking on terms and conditions of employment which the NLRA was designed to regulate, and the protest must be remediable by the primary employer.[60]

However, in a suit for private damages filed by an importer of Russian wood products, the Supreme Court held that the activities of the importers, shippers, and stevedore companies were "in commerce" within the meaning of section 8(b)(4) of the NLRA. In *ILA v. Allied International, Inc.*,[61] the Court distinguished the positions of the union and American importers in that case from

58. 626 F.2d at 450.

59. *Id.* It is interesting to note that the court, in substance, characterized the union's conduct as secondary. The ILA did not seek to affect the labor relations of employers with whom it had contracts, but rather was withholding services from neutral parties, the importers, to register a public outcry against Russian foreign policy and continued trade with that nation. *Id.* at 449.

60. *See* Windward Shipping, Ltd. v. American Radio Ass'n, 415 U.S. 104, 114-15 (1974). In *Windward Shipping*, the ILA picketed against the loading of Liberian vessels because the wages paid non-American seamen aboard those vessels were "substandard to those of American seamen." *Id.* at 107.

61. 102 S.Ct. 1656 (1982). *See supra* notes 25-32 and accompanying text.

the conduct of the litigants in a prior line of cases which had articulated a general policy of restraint in applying U.S. laws to foreign maritime operations. In *Benz v. Compania Naviera Hidalgo*,[62] the Court held that picketing by an American union in support of the striking foreign crew of a foreign-flag ship was not covered by the NLRA, and the activities of the foreign vessel were not "in commerce" on the basis that the labor laws are not designed to resolve disputes between "nationals of other countries operating ships under foreign laws."[63]

Similarly, in *Windward Shipping Ltd. v. American Radio Association*,[64] a U.S. union picketed foreign ships in protest of the low wages received by the foreign seamen and the adverse impact which such wages had on members of the U.S. maritime union. The Court held that the union's conduct was not "in commerce under the labor laws where the picketing was intended to raise the operation costs of foreign vessels, and where the conduct had "more than a negligible impact on the 'maritime operations' of . . . foreign ships."[65] In sum, like those principles limiting the extraterritorial reach of American antitrust laws, the above cases demonstrate that an American union's conduct will not be "in commerce" when it is designed solely to affect the maritime operations of foreign ships.

In contrast, the Supreme Court in *Allied International* distinguished the ILA's Russian boycott from similar actions in its prior cases, and deemed the policy basis behind this line of precedent to be inapplicable to the Longshoremen's conduct. First, the union's refusal to unload the Russian goods did not affect the maritime operations of a foreign vessel. The union was not attempting to improve the working conditions of foreign workers or extending benefits enjoyed by American employees and employers under the NLRA to foreign seamen and shipowners. Furthermore, the ILA's Russian boycott involved and affected only American nationals. As the Court of Appeals explained, the "drama" was "played out by an all-American cast."[66] The judicial tradition of restraint in applying American laws to ships of a foreign country was thus inapplicable where "an American union . . . ordered its members not to work for an American stevedore which . . . con-

62. 353 U.S. 138 (1957).
63. *Id.* at 143, *quoted in Allied Int'l*, 102 S.Ct. at 1661.
64. 415 U.S. 104 (1974).
65. *Id.* at 114–15.
66. 640 F.2d at 1374.

tracted to service an American ship carrying goods of an American importer."[67]

3. *Substantive Analysis of the Secondary Hybrid Boycott*

Although the jurisdiction of the Board is questionable in a hybrid dispute, several courts have addressed the substantive claim of secondary conduct.[68] The federal prohibition in section 8(b)(4) against secondary boycotts provides that:

> It shall be an unfair labor practice for a labor organization or its agents: (i) to engage in . . . or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to . . . handle or work or any goods . . . or to perform any services; . . . (ii) . . . where . . . an object thereof is . . . (B) forcing or requiring any person to cease doing business with any other person . . .[69]

Secondary conduct by unions, however, is not defined by the statute or legislative history.[70] This inquiry has been left to the courts to determine on a case-by-case basis which has resulted in conflicting standards, vague linedrawing, and judicial hairsplitting.[71]

The rudiments of a secondary boycott generally exist where a neutral party, unrelated to the employment relationship, suffers the effects of a boycott because of a union's dispute with its em-

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67. *Id.* at 1372; 50 U.S.L.W. at 4405.

68. *See, e.g.*, Baldovin v. ILA, 626 F.2d 445 (5th Cir. 1980); NLRB v. ILA (Ocean Shipping), 332 F.2d 992 (4th Cir. 1964); Allied Int'l, Inc. v. ILA, 492 F. Supp. 334 (D. Mass. 1980), *rev'd in part,* 640 F.2d 1368 (1st Cir. 1981), aff'd, 102 S.Ct. 1656 (1982); Walsh v. ILA, 488 F. Supp. 524 (D. Mass.), *vacated sub nom.* Walsh v. AFL-CIO Local 799, 630 F.2d 864 (1st Cir. 1980); Danielson v. Fur Dressers, 411 F. Supp. 655 (S.D.N.Y. 1975); Penello v. ILA, 227 F. Supp. 164 (D. Md. 1964).

69. NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

70. During the debates surrounding the enactment of §8(b)(4), Senator Taft remarked in response to queries regarding what conduct should be deemed secondary, "Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." 93 CONG. REC. 4,323 (1947) *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1106 (1948).

71. No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relations has created no concept more elusive than that of "secondary" conduct; it has drawn no line more arbitrary, tenuous, and shifting than those separating "primary" from "secondary" activities.

Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 386-87 (1969). *See also* Local 761, Int'l Union of Elec., Radio & Mach. Workers v. NLRB (General Electric), 366 U.S. 667, 674 (1961).

ployer.[72] The classic secondary case is where a union coerces neutral employers to cease doing business with the primary employer, with whom the union has its dispute, by preventing the neutral parties from obtaining goods or services necessary for their businesses.[73] The classic statement of secondary conduct, however, poses a problem when the party alleging the secondary coercion is the only employer present in the dispute.

The hybrid dispute presents a situation where the putative primary employer incurs damages resulting from a union's dispute with a neutral, nonemployer. The classic secondary pattern, therefore, is reversed: instead of having neutral parties bear the impact of conduct calculated to satisfy the union's objectives with a primary employer, the union in a hybrid dispute is using primary pressure to seek goals beyond the scope of the employee-employer relationship. Yet, the union still pressures a party, albeit the primary employer, who is unable to mollify the union's grievance because the core objective of the dispute still is removed from the place of the boycott impact. Arguably, this conduct should fall within the spirit of section 8(b)(4) since the union has created a schism in the dispute of conciliation and resolution process by exerting economic pressure on a party unable to affect that conciliation.

There is some dispute over whether a controversy with the primary employer is a prerequisite to a secondary boycott. While some courts have ignored the broad terms of the statute and required that the union be involved in a dispute with its employer,[74] other courts, emphasizing congressional concern for the protection of neutral parties from outside disputes, have awarded relief without a showing of a union grievance with the primary employer.[75]

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72. *See* Cushman, *Secondary Boycotts and the Taft-Hartley Law*, 6 SYRACUSE L. REV. 109 (1954); Goetz, *supra* note 12. *See also* Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLO. L. REV. 125 (1959); Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLO. L. REV. 1363 (1962); Lesnick, *Job Security and Secondary Boycotts: the Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000 (1965); Ross, *An Assessment of the Landrum-Griffin Act's Secondary Boycott Amendments to the Taft-Hartley Act*, 22 LAB. L.J. 675 (1971); St. Antoine, *What Makes Secondary Boycotts Secondary?*, 11 LAB. L. DEV. 5 (1965); Note, *Picketing and Publicity Under Section 8(b)(4) of the LMRA*, 73 YALE L.J. 1265 (1964).

73. *See, e.g.*, National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); NLRB v. Denver Bldg & Constr. Trades Council, 341 U.S. 675 (1951).

74. *See, e.g.*, Mishara Constr. Co. v. International Bhd. of Elec. Workers, 554 F.2d 488 (1st Cir. 1977).

75. *See, e.g.*, Walsh v. ILA, 488 F. Supp. at 530 (citing National Maritime Union v. NLRB, 346 F.2d 411 (D.C. Cir. 1965)).

Thus, in a hybrid dispute, there is the possibility that the absence of a union grievance with its employer would not pose an obstacle to finding a secondary boycott. A union's political protest alone, manifested through a boycott, might be a proper subject for a section 8(b)(4) charge.

Ironically, considerations leading to the conclusion that a dispute is *not* a labor dispute or *not* in commerce under the NLRA, such as the political nature of the union's motives, militate in favor of concluding that the hybrid boycott is prohibited secondary conduct. The Fifth Circuit in *Baldovin* paraphrased the Supreme Court's explanation of the primary-secondary dichotomy in *National Woodwork Manufacturers Association v. NLRB*[76] as follows: The touchstone is "whether the union's concern is with the labor relations of the employer against whom its pressures are directed vis-a-vis its own employees (protected 'primary' activity) or whether the activity is 'tactically calculated to satisfy union objectives elsewhere' (prohibited 'secondary' activity)."[77] Where the union is engaged in a work stoppage calculated to satisfy objectives elsewhere, the union's motivations may prevent the issuance of an injunction because the conduct may not be in commerce or a labor dispute. This remoteness of the union objectives, however, would be the basis of traditionally classifying the activity as secondary.

The *Baldovin* court, applying the *National Woodwork* test, deemed the hybrid case to present a classic secondary boycott, yet denied jurisdiction on interpretive commerce-related grounds:

> The stevedoring, shipping, exporting or importing companies and all other persons doing business in the port of Houston and in other ports along the east and gulf coasts are completely neutral with regard to the ILA's dispute with the Soviet Union. The ILA boycott, therefore, is secondary within the meaning of the Act. It violates the purpose of the secondary boycott ban: to compel the union to confront the employer with whom it has its real or primary dispute pursuant to the usual procedures of the NLRA.[78]

With respect to the same boycott of Russian work assignments, the acts of the ILA were considered by the district court in *Walsh v. ILA*[79] to be a primary boycott of Russian goods with incidental

76. 386 U.S. 612, 644-45 (1967).

77. *Baldovin*, 626 F.2d at 449.

78. *Id.*

79. 488 F. Supp. 524, 527 (D. Mass. 1980). While the First Circuit held that the *Baldovin* ruling in the Fifth Circuit was res judicata as to that and subsequent suits, the

effects on the employers dealing in such goods. Citing *National Woodwork*, the court, while not specifically mentioning the first amendment, vaguely referred to the value of union political expression without any analysis of why this value should outweigh the congressional purpose to protect neutral parties. Thus, the union's refusal to accept work assignments on political grounds without pickets, but with the express disclaimer that it seeks to induce a strike of the importer's other employees, was held not to be a secondary boycott, even though it produced the effects of traditional secondary conduct.

The crucial factor in determining that secondary conduct does not exist seems to be the availability of alternative sources of labor with which importers can continue their business and still permit the union to exercise its right of free expression.[80] Alternative labor enables the employer to avoid the economic harm which the secondary boycott sections were meant to remedy.[81] Thus, the union's work stoppage as an expression of political distaste for an offensive action escapes classification as secondary conduct if the importer can freely recruit other nonunion members for those asignments which the union has refused. Where the union action, however, is expressly designed to persuade or results in coercion of other workers to refuse work for the same importers or shippers, the union ought to be in violation of section 8(b)(4).

However, in *ILA v. Allied International Inc.*,[82] the Supreme Court sustained the holding of the Court of Appeals[83] that the

Fifth Circuit ruling on the secondary boycott claim was dicta. The controlling issue was whether the union's activity was in commerce under the NLRA.

80. *See* NLRB v. ILA (Ocean Shipping), 332 F.2d 992, 998 (4th Cir. 1964). *Ocean Shipping* addressed the same concerns and concluded that the mere refusal to refer employees for work assignments, absent strikes, pickets, or pressure tactics, was not secondary conduct. *Id.*

81. Where an employer remains free to recruit other workers, no damage claim under § 303 of the NLRA, 29 U.S.C. § 187 (1976), should be permitted against the union. Since the employer is able to, and indeed, under a contractual analysis obligated to, mitigate damages, any real economic harm flowing to the employer could have been avoided and should not suffice as the basis for a damage suit. RESTATEMENT OF CONTRACTS § 336(1) (1932). Extending this concept further, once the employer's ability to continue production is impaired by union pickets or pressure on other workers, a § 303 suit becomes an appropriate vehicle for redressing secondary conduct which cannot be remedied with equitable devices. The damage suit provision relates only to the rationale that the secondary boycott provisions are designed to prevent economic harm to neutral parties which flows from conduct beyond their control. These actions do not relate to the other basis for a § 10(*l*) injunction—forcing the primary employer and union into the conciliation process, a task which is beyond the capacity of the courts in a hybrid dispute.

82. 102 S.Ct. 1656 (1982). *See supra* notes 25-32 & 61-67 and accompanying text.

83. 640 F.2d 1368 (1st Cir. 1981).

ILA boycott was within section 8(b)(4)'s prohibition of secondary boycotts, despite its political purpose. Justice Powell, writing for the majority, in language harkening back to the *National Woodwork* standard, found the union's conduct to fall within the literal terms of section 8(b)(4).

> The ILA has no dispute with Allied, Waterman, or Clark. It does not seek any labor objective from these employers. Its sole complaint is with the foreign and military policy of the Soviet Union. As understandable and even commendable as the ILA's ultimate objectives may be, the certain effect of its action is to impose a heavy burden on neutral employers. And it is just such a burden, as well as widening industrial strife, that the secondary boycott provisions were designed to prevent.[84]

Furthermore, the Court rejected the union's argument that the Russian boycott was not "secondary" because its object was not to halt business between the importers, shippers, and stevedore companies but merely to free ILA members from the "morally repugnant duty of handling Russian goods."[85] Rather, the Court imputed the forbidden intent under section 8(b)(4) to pressure secondary or neutral employers to any union boycotting products whose sale constituted a major source of profit for the company. The Court formulated a "forseeability" test for assessing damages flowing from a secondary boycott.

> [W]hen a purely secondary boycott reasonably can be expected to threaten neutral parties with ruin or substantial loss, the pressure on secondary parties must be viewed as at least one of the objects of the boycott or the statutory prohibition would be rendered meaningless. The union must take responsibility for the "forseeable consequences" of its conduct.[86]

Finally, the Court refused to create a "large and undefinable exception" to section 8(b)(4)'s prohibition of secondary conduct for "political" boycotts. First, the Court interpreted Congressional history as supporting a broad application of section 8(b)(4). Despite criticisms that the secondary boycott provisions as drafted were too broad, Congress enacted section 8(b)(4) to prohibit *all*

84. 102 S.Ct. at 1662-63. The Court did not address the issue whether such conduct constituted a "labor dispute," but rather emphasized that the Congressional purpose behind § 8(b)(4) was to shield "unoffending employers and others from pressures in controversies not their own." *Id.* at 1663, n.20 (citing NLRB v. Denver Building Trades Council, 341 U.S. 675, 692 (1951)).

85. 102 S.Ct. at 1663.

86. *Id.* (citing NLRB v. Retail Store Employees, 447 U.S. 607, 614 n.9 (1980)).

secondary boycotts "bad," as well as "good"[87] in order to protect "the helpless victims of quarrels that do not concern them at all."[88] Second, the Court reasoned that a distinction between boycotts undertaken for labor objectives and those pursued for "political" ends would be unworkable and difficult to make in many cases. In declining to treat union concerted action for political aims more leniently than a traditional labor dispute." It went further to agree with the Court of Appeals that it is "more rather than less objectionable that a national labor union has chosen to marshall against neutral parties the considerable power, derived from its locals and itself under the federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity."[89]

B. *The Norris-LaGuardia Act and the Presence of a Collective Bargaining Agreement*

Many of the hybrid cases litigated in federal courts have involved injunctions sought by employers faced with work stoppages in violation of no-strike promises contained in the collective bargaining agreements. The Supreme Court's holding in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*[90] has provided redress for such employers by stipulating that in certain situations the employer faced with a breach of a no-strike provision may seek an injunction and an order to arbitrate the grievance over which the union is striking.

In contrast with the reference to labor dispute in section 2(9) of the NLRA, which confers jurisdiction on a federal agency to remedy unfair labor practices, the Norris-LaGuardia Act prevents federal courts from issuing injunctions against labor disputes.[91] Section 13(c) of the Act defines labor dispute as follows:

> The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.[92]

87. 102 S.Ct. at 1664, n.23.

88. *Id.* at 1664 (citing H.R. REP. No. 245, 80th Cong., 1st Sess. 23 (1947)).

89. *Id.* at 1664 (citing 640 F.2d at 1378).

90. 398 U.S. 235 (1970).

91. Norris-LaGuardia Act § 1, 29 U.S.C. § 101 (1976).

92. *Id.* § 13(c), 29 U.S.C. § 113(c) (1976).

Section 4(a) incorporates the term labor dispute in establishing the general limitations on federal courts:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction *in any case involving or growing out of any labor dispute* to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing . . . any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment.[93]

While this general restriction on federal court injunctions remains effective today, a union's work stoppage in the face of a collective bargaining agreement containing a union no-strike promise, together with an employer's agreement to submit certain disputes to binding abritration, may permit a *Boys Markets* injunction[94] to issue if the dispute is arbitrable under the criteria established in *Buffalo Forge Co. v. United Steelworkers*.[95]

1. *Non-Arbitrability*

Although the inquiry into the scope of judicial power over labor disputes under the Norris-LaGuardia Act differs from that in NLRA section 8(b)(4) cases, federal courts have exhibited a general reluctance to deal with hybrid disputes in collective bargaining situations. The Fifth Circuit, in *United States Steel Corp. v. UMW*,[96] denied a *Boys Markets* injunction for a union strike in violation of a no-strike clause on the ground that the work stoppage was nonarbitrable.[97] Because the *Boys Markets* guidelines seek to vindicate and encourage the arbitration process, the court examined whether any arbitration award could resolve the union's grievance. The court concluded that the union's grievance did not arise from the employment relationship between the company and the striking employees, but rather was motivated by opposition to South African racial policies and resentment against the importa-

93. *Id.* § 4(a), 29 U.S.C. § 104(a) (1976) (emphasis added).

94. 398 U.S. 235 (1970). Injunctive relief will be granted against a union striking under a collective bargaining agreement containing a mandatory grievance adjustment or arbitration procedure and an express or implied no-strike promise. *Id.* at 253.

95. 428 U.S. 397 (1976). A grievance is deemed to be arbitrable when the dispute and the issues underlying it are subject to the settlement procedure and arbitration provisions provided by the contract between the union and employer.

96. 519 F.2d 1236 (5th Cir. 1975), *reh'g denied*, 526 F.2d 376, *cert. denied*, 428 U.S. 910 (1976). The Supreme Court, in Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976), cited *U.S. Steel* as "in accord" with the Second Circuit decision affirmed by the Supreme Court in *Buffalo Forge*. 428 U.S. at 404 n.9.

97. 519 F.2d at 1248.

tion of coal produced by cheap labor.[98] Thus, the court was powerless to order arbitration over a subject beyond the scope of the traditional labor dispute between an employer and a union aimed at such a distant third party.[99]

Under *U.S. Steel*, a union that is dissatisfied with the employer's importation of goods produced at substandard wages can halt work with impunity as long as the dispute is deemed nonarbitrable under the *Buffalo Forge* principles.[100] This result stems from the concern voiced in *Ocean Shipping* that disputes extending in purpose or effect beyond the jurisdictional contacts of the federal courts cannot be brought under the equity power of the federal judiciary.[101] Consequently, the effect of finding a controversy to be nonarbitrable under the Norris-LaGuardia Act will be a denial of an injunction in the hybrid dispute, despite the fact that there is a binding collective bargaining agreement containing a no-strike provision.

2. *The Role of the Labor Dispute Under Norris-LaGuardia*

Although the initial interpretive analysis under the Norris-LaGuardia Act parallels that under the secondary boycott provisions of the NLRA, the effects of finding no labor dispute in the hybrid case may cause a radically different result. Because the Norris-LaGuardia Act's anti-injunctive provisions are dependent on the existence of a labor dispute, if no labor dispute is present, the Norris-LaGuardia Act does not apply, and an injunction may issue. Thus, the courts may disregard the *Boys Markets* considerations and avoid issues of nonarbitrability.

The courts, however, have had considerable difficulty affecting their conclusions that neither a labor dispute nor an arbitrable issue exists. There are two possible outcomes which can be posited for the hybrid case under the Norris-LaGuardia Act. First, a court may conclude that no labor dispute exists and that the Norris-LaGuardia Act's prohibition does not apply. The court then may award damages or issue an injunction based on a breach of contract theory, asserting federal court jurisdiction to administer contractual disputes under Section 301(a) of the Labor Manage-

98. *Id.* at 1247-48.

99. The court made no reference to the definition of labor dispute but rather referred the parties to an alternative remedy for a secondary boycott through a § 10(*l*) injunction or a Taft-Hartley § 303 damage suit. 519 F.2d at 1247 n.23.

100. *See supra* note 78.

101. *See supra* text accompanying notes 42-45.

ment Relations Act.[102]

In *West Gulf Maritime Association v. ILA*,[103] the court was asked to decide "in the face of repeated admissions of Defendants that no [labor] dispute exist[ed]," [104] whether a federal court was prohibited from issuing an injunction to enjoin a union's violation of a no-strike promise in a collective bargaining agreement.[105] The court permitted an injunction to issue on the ground that the Norris-LaGuardia Act's prohibition was inapplicable where the union was arguing only a political issue and no labor dispute existed.[106] The court based its holding on a breach of contract theory, concluding that equity favored the plaintiffs who faced irreparable harm, while the union was not likely to be injured financially by the injunction. In addition, the court deemed an injunction to be serving the "public interest in upholding and enforcing valid contracts."[107]

The alternative, and now authoritative, approach to the hybrid case produces a vastly different result. In *Jacksonville Bulk Terminals, Inc. v. ILA*,[108] a case arising out of the same controversy as that in *Allied International*,[109] the Supreme Court held that the dispute, in hybrid cases, over whether a no-strike pledge either forbids or permits a work stoppage will be a labor dispute, notwithstanding the presence of an underlying nonlabor dispute with another entity.[110] The Court concluded that "[u]nder our decisions in *Boys Markets* and *Buffalo Forge*, when the underlying dispute is not arbitrable, the employer may not obtain injunctive relief pending the arbitrator's ruling on the legality of the strike

102. LMRA § 301(a), 29 U.S.C. § 185(a) (1976) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

103. 413 F. Supp. 372 (S.D. Tex. 1975), *summarily aff'd*, 531 F.2d 574 (5th Cir. 1976).

104. *Id.* at 375.

105. The ILA, in response to the large grain sale agreements concluded between the USSR and the United States, became concerned with the future price for grain products in this country. A union convention adopted a resolution on July 21, 1975 which provided that the ILA would "refuse to load grain destined for the USSR unless and until the President of the ILA is satisfied that the interests of the American public are adequately protected." 413 F. Supp. at 376.

106. *Id.* at 375-76.

107. *Id.* at 375.

108. 102 S.Ct. 2673 (1982).

109. *See supra* notes 23-32 & 61-63 and accompanying text.

110. 102 S.Ct. at 2680.

under the collective-bargaining agreement."[111]

Thus, the definition of labor dispute is broadened to include any use of economic weaponry typical of union action, irrespective of the union's objectives. The arbitrability test is confined to an inquiry of whether the union's objectives are directed toward a party subject to the collective bargaining provisions and the arbitrator's jurisdiction.

III. THE ANTITRUST LAWS

The antitrust laws are designed generally to prevent business and commercial restraints which restrict production, raise prices, or otherwise control the market to the detriment of purchasers and consumers of goods and services.[112] Consequently, many groups seeking political change through boycotts have been the subject of antitrust complaints because of the adverse economic impact which these activities have on third parties and the free flow of interstate commerce.[113] The exercise of free political expression, however, has been safeguarded by a restriction of the antitrust laws to the province for which the courts deemed they were intended—commercial activities and restraints of trade by capital enterprises. From this expansive precept, the United States Supreme Court has interpreted the Sherman Act[114] with an eye to its congressional intent and has narrowed its scope in two major ways.

Under *United States v. Hutcheson*,[115] the antitrust laws have been restricted to exclude labor disputes.[116] Unions, therefore, have been allowed latitude under the labor exemption to engage

111. *Id.* at 2687.

112. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); Allied Int'l v. ILA, 492 F. Supp. 334 (D. Mass. 1980), *rev'd in part*, 640 F.2d 1368 (1st Cir. 1981).

113. *See* Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945); United States v. Hutcheson, 312 U.S. 219 (1941); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Lawlor v. Loewe (Danbury Hatter's case), 235 U.S. 522 (1915); Loewe v. Lawlor, 208 U.S. 274 (1908); Bird, *supra* note 7; Note, *supra* note 7. *See also* S. REP. NO. 105, 80th Cong., 1st Sess. 22 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947, at 428 (1948):

> [Section 8(b)(4)] makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3.

114. 15 U.S.C. §§ 1-7 (1976).

115. 312 U.S. 219 (1941).

116. *See infra* notes 103-10 and accompanying text.

in strikes, boycotts, and other activities, as long as the union acts in its own self-interest.[117] Additionally, the Sherman Act has been narrowed to exclude select group actions involving petitioning of government or directed towards encouraging law enforcement.[118] Thus, any boycott by a union organization will raise issues concerning the impact of this concerted action on trade and the possibility of qualified union immunity to the antitrust laws.[119]

A. *The Labor Exemption and the* Hutcheson *Formula*

Organized labor's action on political issues removed from the traditional union context presents an unusual and often competing blend of antitrust and labor concerns. Unions seeking political change through boycott action can be the subject of antitrust complaints because of the adverse economic effects on the free flow of interstate commerce which these activities produce. Prior to enactment of the Clayton and Norris-LaGuardia Acts, union boycotts and strikes frequently were enjoined as restraints of trade under the Sherman Act. The *Hutcheson* "labor exemption" to the antitrust laws was the Supreme Court's attempt to harmonize federal labor and antitrust policy objectives. As a result, unions have the latitude to engage in collective action with anti-competitive

117. *See* Sovern, *Some Ruminations on Labor, the Antitrust Laws and* Allen Bradley, 13 LAB. L.J. 957 (1962); Winter, *Collective Bargaining and Competition: the Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 36 n.96 (1963). Sovern sees duplication of remedy problems in applying antitrust law to labor disputes, and favors the use of the labor provisions. Where the labor laws are inapplicable, however, as in the hybrid disputes, this problem is eliminated. The exclusive jurisdiction and preemption issues are also discussed in Connell Constr. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975); Local 189, Meat Cutters & Butcher Workmen v. Jewel Tea, 381 U.S. 676 (1965).

With respect to the Norris-LaGuardia Act and *Boys Markets* problems, Winter discusses anticompetitive incentives created by collective bargaining based on employee organization along product market lines, and finds that with respect to anticompetitive effects, the primary strike is as effective in restraining trade as the secondary boycott. *See generally* Mann, Powers & Roberts, *The Accommodation Between Antitrust and Labor Law: The Antitrust Labor Exemption*, 30 LAB. L.J. 295 (1979); Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976); Note, *Cooperative Collective Bargaining Conduct Among Trade Competitiors and the Non-Statutory Labor Exemption from Antitrust Liability*, 9 RUT.-CAM. L.J. 477 (1978).

118. Eastern Ry. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

119. The hybrid cases, as they have been presented in the federal courts, never have involved allegations that the union is acting with employers to restrict competition or control the product market. *See* UMW v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. Local 3, International Bh'd of Elec. Workers, 325 U.S. 797 (1945).

effects, so long as the union acts in its self-interest and does not combine with nonlabor groups.

1. *The Decision*

United States v. Hutcheson[120] involved the longstanding controversy between the Brotherhood of Carpenters and the Machinists' Union over the erection and dismantling of machinery at the St. Louis Anheuser-Busch plant. The employer's rejection of Carpenters' demands and the Carpenters' refusal to arbitrate pursuant to previous agreements prompted a strike against Anheuser-Busch and their tenant, Gaylord Container Corporation, and a general boycott of Anheuser-Busch beer.[121] Gaylord was not involved in the labor dispute. The Court read the Sherman Act,[122] Clayton Act,[123] and Norris-LaGuardia Act[124] together in light of their respective congressional purposes and delineated the following test for the issuance of injunctions under the antitrust laws:

> *So long as a union acts in its self-interest and does not combine with non-labor groups*, the licit and the illicit under §20 [of the Clayton Act] are not to be distinguished by any judgment re-

120. 312 U.S. 219 (1941).

121. *Id.* at 228. The indictment stated that the union picketed Gaylord and Anheuser-Busch "bearing umbrellas and charging Anheuser-Busch, Inc., to be unfair to organized labor . . . . " *Id.* at 238 (Stone, J., concurring). The government further alleged:

> [The union] brought about a "boycott of beer brewed by Anheuser-Busch . . . and of dealers in said beer throughout the United States," by distributing to members of labor organizations and to the public at large in many states and by published notices circulated interstate "denouncing Anheuser-Busch, Inc. as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing and drinking said beer."

Id. at 239 (Stone, J., concurring) (quoting indictment). Both the strikes against Gaylord and the boycott of the Anheuser-Busch beer dealers arguably would be violations of § 8(b)(4) today, unless they would fall within the "allied doctrine" or product picketing exemptions. *See supra* note 10.

122. Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1 (1976).

123. Section 6 of the Clayton Act provides in pertinent part:

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1976). Section 20 of the Clayton Act reads in part: "No restraining order or injunction shall be granted by any court of the United States . . . in any case . . . involving, or growing out of, a *dispute concerning terms or conditions of employment* . . . . " 29 U.S.C. § 52 (1976) (emphasis added).

124. *See supra* note 50 and accompanying text.

> garding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[125]

The court reasoned that Congress' inclusion of the term labor dispute in the Norris-LaGuardia Act to deprive federal courts of jurisdiction and in the Clayton Act to declare unions not to be conspiracies in restraint of trade, indicated a broad immunity to be conferred on union activities.[126] In the Clayton and Norris-LaGuardia Acts, therefore, Congress exempted from the antitrust laws "activities which had become *familiar incidents of union procedure*."[127] The *Hutcheson* test indicates when the union is actually involved in such a procedure, as opposed to purely commercial, social, or political action.

2. *The Hybrid Dispute*

In the antitrust context, the hybrid case arguably would not fall within the *Hutcheson* exemption for three reasons. First, based on the Norris-LaGuardia Act and section 20 of the Clayton Act, which applies to employment disputes, the *Hutcheson* test is inapplicable to a controversy which has been defined previously by the courts as a nonlabor dispute.[128] Thus, the *Hutcheson* test which "infused" Norris-LaGuardia's definitions of the "immunized trade union activities" into the Clayton Act prohibitions does not reach union political boycotts.

Second, the terms of the *Hutcheson* test do not address the type of union conduct involved in the hybrid case because the union is not actually working in its self-interest.[129] In fact, the union's refusal to accept jobs on ships engaged in trade with the USSR may harmfully affect its rank and file by depriving them of opportunities and financial support. With respect to the second prong of the *Hutcheson* test, combinations with nonlabor groups are not indi-

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125. 312 U.S. at 232 (emphasis added).

126. *Id.* at 235.

127. *Id.* at 237 (emphasis added). *See* Local 189, Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 689 (1965) (controversies about which employers and unions are required to bargain exempted from antitrust laws).

128. *See supra* notes 39-49 & 74-94 and accompanying text.

129. *See* Adams, Ray & Rosenberg v. William Morris Agency, Inc., 411 F. Supp. 403 (C.D. Cal. 1976). *Accord* H.A. Artists & Assocs. Inc. v. Actors Equity Ass'n, 478 F. Supp. 496, 502 (S.D.N.Y. 1979) (conduct considered to be in the union's self-interest if the acts bear a "reasonable relationship to a legitimate union interest"). *See also* Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 B.U.L. REV. 317 (1966).

cated in the hybrid dispute.[130]

Third, the hybrid case involves activities with objectives that are not familiar incidents of union procedure. The Supreme Court has interpreted Norris-LaGuadia and the Clayton Act to protect a class of traditional union agitation defined according to union self-interest motivations—a category removed from the hybrid use. Moreover, American history and law has never deemed political disputes to be "traditional union activities."[131] If union procedure, however, were to be interpreted with reference to traditional union tactics, such as work stoppages, the hybrid case would involve familiar incidents of union procedure. The basis of the labor exemption, however, is premised on the purpose of the Clayton and Norris-LaGuardia Acts. Since these laws were designed to address labor conflicts, and not political disputes, a conclusion more consistent with the legislative mandate would exclude political conduct from the labor exemption.

Another guideline for determining whether union conduct is excluded under the labor exemption was offered by the Supreme Court in *Local 189, Meat Cutters & Butcher Workmen v. Jewel Tea*.[132] *Jewel Tea* questioned whether the subject of the union's work stoppage—political dissatisfaction or anti-Soviet, anti-Iranian, or anti-South African animus—falls within that class of mandatory subjects about which employers must bargain. Analyzing the case under provisions of the NLRA, and not Norris-LaGuardia, the Court concluded that if the subject requires bargaining, the union conduct is exempt from the Sherman Act.[133]

Since the cases interpreting labor disputes, in a hybrid context exclude political activity from the provisions of the NLRA, such activity would a fortiori fail the more narrow test for a mandatory

130. A suit by an individual worker against a union might constitute a labor dispute if a boycott resulted in a substantial loss of jobs and work assignments and created economic detriment to the individual workers. Such a claim may be a labor dispute since it affects the employees' job rights and security. Such a controversy, however, probably would not involve an arbitrable issue because arbitration is a mechanism for resolving disputes between an employer and its employees. This situation arguably could involve a breach of a union's duty of fair representation. *See* Note, *Can Negligent Representation Be Fair Representation: An Alternative Approach to Gross Negligence Analysis*, 30 CASE W. RES. L. REV. 537 (1980).

131. Allied Int'l, Inc. v. ILA, 492 F. Supp. at 338.

132. 381 U.S. 676 (1965).

133. *Id.* at 689-91. Unfair labor practices include a reusal to bargain collectively with respect to "wages, hours and other terms and conditions of employment." 29 U.S.C. §§ 158(c)(5), (b)(3), 159(a) (1976). *See also* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958) (standards for mandatory versus permissive subjects of bargaining defined).

subject of bargaining. That political disputes involve issues deemed nonarbitrable under *U.S. Steel*[134] also indicates that they fall outside of the traditional concerns of institutions designed to resolve labor controversies, and thus are not to be afforded congressional immunization from the antitrust laws.

Under *Jewel Tea*, therefore, traditional union action is considered a restraint of trade when the union demand, if ignored, will not affect the wages or hours of workers. In such a case, the union grievance is so attenuated from work conditions that a work stoppage is an unreasonable restraint on the employer's free operation of production.[135] In theory, however, where a union demand is not concerned with a labor dispute qua labor dispute, there ought to be no impact on the employer, since it can be assumed that an employer's only nexus with the union is in employment related matters. In the hybrid case, therefore, if the employer can acquire other workers and carry on its business despite the concerted action, there would be no trade restraints.[136]

In an ongoing employment relationship, however, such as that present in *U.S. Steel* where there was a work stoppage that included a walk-out, work refusals, and picketing of the employer's headquarters, the hybrid dispute poses the possibility of economic detriment, production slowdown, and hampering of the employer's capacity to continue business as usual.[137] Such an employer may have an exceedingly difficult time recruiting nonunion personnel to replace the striking workers. Moreover, the highly visible nature of this protest strike probably would result in other workers refusing to cross the picket line to make deliveries or perform adjunct services necessary to the plaintiff's continued operation.

In the cases involving the ILA's protest and directives ordering work stoppages on Russian ships, the strikes consisted of "immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed."[138] The order applied to all vessels and all cargoes including grain, foods, and other valuable general

134. *See supra* notes 78-79 and accompanying text.

135. 381 U.S. at 693 n.6.

136. *See* Walsh v. ILA, 488 F. Supp. 524, 530 (D. Mass. 1980).

137. United States Steel Corp. v. UMW, 519 F.2d 1236 (5th Cir. 1975). The work stoppage occurring on June 17, 1974 caused a loss to the plaintiff of over $4,000 for each shift. *Id.* at 1240 n.5.

138. 488 F. Supp. at 526 n.1.

freight.[139] These cases seem germane to antitrust sanctions, given that the terms of the labor exemption do not apply literally to the hybrid dispute. Furthermore, the restraints on trade produced by such work stoppages have been severe, even though the union has not intentionally restrained the primary employer. Thus, the use of traditional labor tactics, which in other contexts are protected activity, does not affect the narrower scope of the antitrust exemption which excludes the hybrid case.

B. *The Political Activity Exemption to the Antitrust Laws*

The Supreme Court has narrowed the application of the Sherman Act to exclude select group actions involving petitioning of governments or encouraging law enforcement, despite admitted competitive motives. To the extent that federal courts exempt hybrid conduct from the antitrust laws under a political conduct exception rather than the classic labor exemption, the issue shifts to whether this exemption sweeps so broadly as to encompass the union boycott with nonunion political motivations.

1. *The* Noerr *Doctrine*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, [140] a trucking group sued a group of railroads under Section 4 of the Clayton Act[141] for violations of Sections 1 and 2 of the Sherman Act.[142] Seeking treble damages and injunctive relief, the plaintiffs claimed that the defendants conducted a publicity campaign against the truckers to persuade the state government to adopt laws destructive to the trucking industry and distributed information designed "to create an atmosphere of distaste for the truckers . . . and to impair the relationships existing between the truckers and their customers."[143] The truckers also claimed, and

139. *Id.*

140. 365 U.S. 127 (1960).

141. Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue in any district court of the United States . . ., and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1976).

142. For the text of the relevant portion of § 1 of the Sherman Act, see *infra* note 105. Section 2 of the Sherman Act provides in part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . .

143. 365 U.S. at 129.

the railroads admitted, that the campaign was motivated by a desire to destroy the truckers as competitors in the long-distance freight business.[144]

The Supreme Court held that a malicious publicity campaign, affected through dissemination of disparaging information, together with the exertion of pressure on the legislature designed to destroy a competitor's business, was not a violation of the Sherman Act.[145] The *Noerr* holding is premised on statutory interpretation and the desire to facilitate democratic decisionmaking by promoting the free and efficient flow of information to the legislature. This structural concern with the preservation of democracy, combined with the Sherman Act's purpose to regulate business activity and not political action, led to the *Noerr* doctrine: "[T]he Sherman Act does not apply to the activities of the [defendant] at least insofar as those activities comprised *mere solicitation of government action* with respect to the *passage* and *enforcement of laws*."[146]

2. *Essential Dissimilarity*

The Court in *Noerr* reasoned that when a group's activity is directed toward obtaining governmental action, its legality is not affected by any anticompetitive purpose.[147] In determining whether the railroads were seeking governmental action, the

144. *Id.*

145. *Id.* at 136-37.

146. *Id.* at 138 (emphasis added).

147. *But cf.* Hunt v. Crumboch, 325 U.S. 821 (1945). *Hunt* held that a refusal to accept employment because of personal distaste for the employer was not a violation of the Sherman Act. *Id.* at 823. During a previous strike of the plaintiff's operation, a union member had been killed, and a member of plaintiff's partnership was tried for and acquitted of homicide. The basis of the complaint was that the union's refusal to sell its services to the employer prevented him from obtaining any other truck hauling contracts in the state. Although the court acknowledged the union's ability and purpose to damage the corporation by its refusal to accept employment, the Sherman Act did not extend to such conduct.

Justice Roberts, dissenting, argued that a union's express purpose to drive an employer out of the business as an interstate motor carrier and the elimination of competition between such carriers which resulted from the workers' agreement fell within the Sherman Act prohibitions. *Id.* at 826.

While an anticompetitive effect was established in *Walsh* because shippers were forced to repudiate transport agreements, cancel several loading calls, and reroute their scheduled deliveries for United States ports to Canada, the majority of hybrid cases involve no anticompetitive animus. *See, e.g.*, Jacksonville Bulk Terminals, Inc. v. ILA, 102 S.Ct. 2673 (1982); ILA v. Allied Int'l, Inc., 102 S.Ct. 1656 (1982); Baldovin v. ILA, 626 F.2d 445 (5th Cir. 1980); Walsh v. ILA, 488 F. Supp. 524 (D. Mass.), *vacated sub nom.* Walsh v. AFL-CIO Local 799, 630 F.2d 864 (1st Cir. 1980).

Court focused on the "essential dissimilarity"[148] between agreements to seek legislation or law enforcement and those combinations normally held violative of the Sherman Act.[149] The hybrid case generally does not involve proposed legislation or lobbying input. In cases such as *U.S. Steel* and the Russian and Iranian boycotts, however, the union may have attempted to influence either the executive's foreign policy or the legislature's position on the importation of certain goods.[150]

Noerr, however, involved legal government petitioning which sought to achieve illegal anti-competitive restraints. Thus, *Noerr* could be read as only protecting legitimate means and as regarding motive as irrelevant. Assuming *Noerr* can be interpreted in this fashion, hybrid conduct would not be exempted from the antitrust laws. An antitrust exemption for hybrid conduct would fail because such conduct involves a legally questionable means—the withdrawal of labor—to achieve a legitimate political end. Ignoring the legitimate end, *Noerr* would not protect the possibly illegal means use in a hybrid dispute.

In *West Gulf Maritime Association v. ILA*,[151] the Longshoremen's Association's resolution, mandating for the boycott of grain destined for the USSR, stipulated that concerted action would

148. 365 U.S. at 136.

149. "[A]greement[s] or understanding[s] that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the *use* of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar agreements." *Id.* (citing Apex Hosiery Co. v. Leader, 310 U.S. 469, 491-493 (1940)) (emphasis added).

150. *See* Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (discussion of the presumption against implied exclusions from the antitrust laws). *Lafayette* cited UMW v. Pennington, 381 U.S. 657, 669-72 (1965) for the following proposition:

> [R]egardless of the anticompetitive purpose or effect on small competing mining companies, the joint action of certain large mining companies and labor unions in lobbying before the Secretary of Labor in favor of legislation establishing a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority and in lobbying before TVA to avoid coal purchases exempted from the legislation was not subject to antitrust attack. Cases subsequent to *Pennington* have emphasized the possible constitutional infirmity in the antitrust laws that a contrary construction would entail in light of the serious threat to First Amendment freedoms that would have been presented.

435 U.S. at 399 n.17. *See also* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), which held that the exercise of first amendment rights of access to administrative agencies and courts are not immune from the antitrust laws when the sole purpose is to eliminate a license applicant as a competitor. *Pennington*, however, still involved the means sanctioned by *Noerr*—union lobbying and the petitioning of government institutions for political change.

151. 413 F. Supp. 372 (S.D. Tex. 1975), *summarily aff'd*, 531 F.2d 574 (5th Cir. 1976). *See supra* notes 87-89 and accompanying text.

continue "until the interests of the American public are adequately protected."[152] Although the district court characterized this language as indicating nothing more than a "speculative concern for the future price of grain products,"[153] in the United States, the motives behind this particular work stoppage closely parallel those in *Noerr*. Like the union in *Noerr*, the union in *West Gulf* was trying to raise public consciousness of a particular issue and affect change through governmental processes.[154] In the hybrid case, however, the restraints on trade do not stem from any future legislative provisions designed to restrain competitors, but flow directly from the union's work stoppage. If *Noerr* stands for the proposition that only political activity entailing anticompetitive effects through government action is exempt, then the direct restraints by labor unions would not be protected from the antitrust laws. Apparently rejecting this interpretation of *Noerr*, *Allied International, Inc. v. ILA*,[155] the only federal case addressing the antitrust laws in a hybrid dispute, concluded that the political motive of the union required its conduct to be exempt.[156]

3. *Extension of the* Noerr *Doctrine to Noncommercial Boycotts*

A narrow reading of *Noerr* arguably does not exempt the hybrid case from antitrust sanctions. The exemption provided under the *Noerr* doctrine, however, has been expanded to encompass political boycotts by interest groups for nonanticompetitive motives. Thus, this broader reading of *Noerr* provides a stronger case for excluding hybrid activity from antitrust law coverage.

a. *Missouri v. National Organization for Women* (NOW). In 1977, the National Organization for Women (NOW) launched a campaign for a convention boycott of states which had not ratified the Equal Rights Amendment (ERA). Because NOW's organizational campaign resulted in revenue losses for the Missouri convention trade and the state economy, Missouri sued NOW under the Clayton and Sherman Acts requesting injunctive relief against the group activities.[157] The district court characterized the boycott as noncommercial and not undertaken to advance the economic

152. 413 F. Supp. at 376.

153. *Id.* at 375.

154. For a discussion of union lobby activities and their extensive participation in the American political processes, see *supra* notes 10-11.

155. 492 F. Supp. 334 (Mass. 1980), *rev'd in part*, 640 F.2d 1368 (1st Cir. 1981).

156. 640 F.2d at 1380.

157. 467 F. Supp. 289 (W.D. Mo. 1979).

self-interests of the participants. The court considered NOW's motivation to be directed at affecting change through a governmental process, i.e., ratification of a constitutional amendment. The court also interpreted NOW's action as a symbolic gesture to attract public attention to the ratification issue.[158]

The Eighth Circuit Court of Appeals affirmed, holding that the Sherman Act did not cover NOW's actions.[159] Citing *Noerr* and discussing the the Sherman Act's legislative history, the majority concluded that the antitrust laws were not intended to regulate social or political activities, but rather commercial ventures with market-oriented objectives.[160] The Eighth Circuit characterized NOW's campaign as political activity designed to persuade the state legislature to ratify the ERA.[161] Thus, under *Noerr*, this activity was essentially dissimilar from the agreements traditionally condemned by the Sherman Act and it involved the people's right to freely inform and petition the government.[162]

The dissent, however, emphasized that *Noerr's* test for the antitrust exclusion does not focus on the motives of the group, but rather on whether antitrust enforcement would impinge severely on some fundamental national policy. According to the dissent, *Noerr* is distinguishable on its facts when a group goes beyond using a publicity campaign as a lobbying tool "and combine[s] with others to boycott a specific, identifiable segment of a highly competitive industry" to communicate its wishes to the legislature.[163] The dissent concluded, therefore, that a court must balance the first amendment interests with the disruptive effect on free market competition and potential economic injury that can flow from a particular practice.[164]

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158. *Id.* at 295.

159. Missouri v. NOW, 620 F.2d 1301 (8th Cir. 1980).

160. *Id.* at 1311-12.

161. *Id.* at 1316.

162. The court specifically distinguished Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920), which involved a noncommercial boycott, but did not involve the use of government petitions. 620 F.2d at 1304. The dissent, however, urged that the attempt to distinguish *Council of Defense* ignored an analysis which "should reckon with the potential economic disruption produced by the manner of using economic weapons as communication." *Id.* at 1324 n.17 (Gibson, J., dissenting).

163. 620 F.2d at 1323.

164. *Id.* at 1325. The first amendment implications of a judicial or statutory prohibition on a union's political self-expression through boycotting cannot be overlooked. *Cf.* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (Massachusetts statute prohibiting political advertising sponsored by corporations violated the corporations' first amendment freedom of expression).

b. *The Hybrid Case under* NOW. Both the majority and dissent in *NOW* would not exempt the hybrid dispute unless such a case involved petitioning the government through political activity. In some hybrid cases, government petitioning may be implied from the union's attempt to pressure importers and ship owners into influencing federal government policies. The *NOW* majority would protect this activity from the antitrust laws—arguably broadening the scope of *Noerr*. However, the dissent in *NOW* would mandate balancing the economic harm to third parties against the extent and nature of the political activities involved. The dissent proposed the following standard for balancing activities unnecessarily harmful to competition against the value of political expression:

> Behavior is "unnecessarily harmful" to competition when it is excessively dangerous without being indispensable to the political activity. Analysis of whether conduct is indispensable to the political activity depends upon (1) the severity of the danger to competition, (2) the availability of a less dangerous alternative, and (3) the customary political character of the challenged behavior.[165]

In determining the "severity of the danger to competition," assuming some danger to competition in the hybrid dispute, it would be necessary to make an extensive, empirical examination of how union political, nonwork-related boycotts affect the competitive stance of companies handling goods of an unpopular foreign nation. These inquiries are made routinely in antitrust litigation and do not present insuperable difficulties for a factfinder. As to the second factor, a "less dangerous alternative" to the union work stoppage would be to permit the union workers to refrain from working with products of parties with whom they are in disagreement, while permitting replacement workers to perform the distasteful work. Since the hybrid work stoppage is not designed to hurt the employer, but rather attempts to stop the usual union business in response to a foreign actor, the alternative is not inconsistent with a meaningful boycott.[166]

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165. 620 F.2d at 1324 n.14 (citing Book Review, 11 RUT.-CAM. L.J. 19, 23 n.36 (1979), which restates the standard proposed in 1 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 205 (1978). *See also* American Communications Ass'n v. Douds, 339 U.S. 382, 397 (1950) ("no absolutist test in weighing when harmful conduct and substantial interests of society can justify restrictions upon speech").

166. A distinction must be made, however, between the case where a union stops work because of personal choice to avoid commingling with politically distasteful employers and where a union seeks to pressure an employer to cease handling certain goods. In the first

Under the third factor, the character of the challenged behavior in the hybrid case is undisputedly not "customarily political." The withdrawal of manpower as a pressure tactic is decidedly intertwined with the rights of unions to use economic self-help to bargain collectively and improve conditions of employment. Finally, the dissent suggests that the difference in the potential extent of economic and anticompetitive injury between primary and secondary boycotts is relevant in politically motivated boycotts.[167] Noting that this distinction has been important in delineating protected from unprotected activity in other noncommerical contexts, such as labor disputes,[168] the dissent suggests that this distinction also might be an appropriate consideration in a political boycott situation.

Thus, the dissent's inquiry evaluates the extenuated economic impact of a secondary boycott to determine whether a labor union's politically motivated work stoppage is in fact secondary.[169] If the hybrid case is secondary conduct, the union would not be in violation of Section 8(b)(4) of the NLRA because of jurisdictional deficiencies. Arguably, however, under an antitrust analysis, the severe economic impact of secondary boycotts would militate for applying the Sherman Act to the hybrid dispute.

IV. CONCLUSION

The hybrid dispute employs the selected means of work stoppages and refusals to deal which are economically destructive, not covered by the NLRA or Norris-LaGuardia Act, and not directed in their simple form toward institutional change. The ends sought in a hybrid case are removed from the workers terms and conditions of employment, are not usually focused on immediate domestic policymaking or law enforcement (though it may have impact on governmental consensus), and involves issues nonarbitrable and noncognizable by arbitrators and federal courts.

There is an inherent inconsistency in declining to view the concerted action of a work stoppage as a labor dispute and not permitting the application of the antitrust laws. The current judicial reluctance to apply either the labor or the antitrust laws to the

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case, replacement workers are appropriate. In the latter, replacement workers would render the boycott meaningless.

167. 620 F.2d at 1325 n.19. *See* Bird, *supra* note 7, at 253; Note, *supra* note 7, at 178, 181, 190.

168. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

169. *See supra* notes 61-72 and accompanying text.

hybrid dispute, however, possibly could be supported with first amendment analysis. Yet, interests involved in free political expression must be balanced with the harm to innocent third parties and the need for the free flow of goods among the states.

A possible compromise would be to forbid the use of concerted actions such as strikes or picketing for political purposes which would prevent the employer from obtaining an alternative work force. The union could, as any other political organization might, organize a large-scale workers' consumer boycott. The union would be free to continue any political protest activity on its own time which did not use the union organizational networks to impair the employer's supply of manpower. If, as the union contends, the hybrid boycott is personal or political, and is not derived from the employer-employee relationship, and is truly based on the union's desire not to give aid and comfort to a nation which it sees as inimical, the employer should be afforded free access to manpower without union objections.[170] This conclusion is supported by the analogous employer's right to rehire freely replacement workers when a union is engaged in a strike.[171]

In sum, the courts should approach the union litigant in a hybrid dispute as they would any other political organization involved in boycotting, thus minimizing the judicial restraint traditionally adopted by the federal courts. Above all, if the union political boycott is in fact unaffected by any labor or antitrust prohibitions, the practical effects of the activities must be assessed so that private enterprise may more effectively deal with and prepare for these work stoppages through private contractual provisions between management and unions.

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170. This solution would be satisfactory, as long as the temporary work force does not impair any workers' rights such as existing seniority or a right to reinstatement.

171. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).